

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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AMERITECH,

Plaintiff-Appellee,

v

M.A.E. CABLE, INC.,

Defendant-Appellant.

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UNPUBLISHED

August 30, 2002

No. 228714

Wayne Circuit Court

LC No. 99-904036-NO

Before: Holbrook, Jr., P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order denying its motion for summary disposition and granting summary disposition to plaintiff pursuant to MCR 2.116(I)(2). We reverse.

**I. Facts and Procedural History**

This action involves a claim for contractual indemnification brought by Ameritech against MAE Cable for claims made against Ameritech after one of defendant's employees, Darrell Thomas, was injured in August 1995 while using a ladder braced onto a pole owned by Ameritech. Thomas' suit against Ameritech, and Detroit Edison and American Energy Services as well, alleged negligence in the failure to warn of the pole's condition and timely remove the pole, which had decayed.

Ameritech and Thomas eventually reached a settlement, and in turn, Ameritech filed this suit against defendant, which was an independent contractor hired to install and remove cable for Barden Cable Company. Ameritech asserted that defendant's negligence also caused Thomas' injuries and that, pursuant to Tariff 20R, defendant must indemnify plaintiff for the amount it paid that was attributable to defendant's negligence. The copy of the tariff submitted with plaintiff's complaint was incomplete and stated that it became effective on various dates in 1996, well after the underlying incident. Defendant moved for summary disposition after repeated efforts to get defendant to come forward with some authority binding defendant to the terms of the tariff when defendant had no legal relationship with plaintiff. The trial court denied this motion when plaintiff produced additional documentation at the last minute.

Shortly thereafter, defendant again moved for summary disposition, asserting that the tariff did not apply because the Michigan Public Service Commission cannot regulate a cable

installer such as defendant; that without an applicable tariff, plaintiff cannot seek indemnification from defendant; and that because the underlying lawsuit filed by Thomas did not assert claims against defendant, the indemnification provisions of the tariff could not apply. In its brief supporting its motion, defendant noted several deficiencies in the portions of the tariff plaintiff had produced, such as the post-accident effective date. Defendant also noted that the operative term “attaching party” was not defined in the portion of the document plaintiff produced.

In response, plaintiff provided other pages from Tariff 20R with effective dates only a few months after the date of the accident and one page from Tariff 12R that became effective in 1993. Plaintiff claimed that these tariffs were in effect at the time of the accident and that the court could use its own common sense in deciding whether defendant was an attaching party.

At the hearing on defendant’s motion, the court stated that it was “satisfied” that the tariff had been issued with legislative authority and that defendant was an attachee (sic) as defined in the tariffs. The court concluded that the indemnification language was, therefore, applicable and that the extent of its applicability was dictated by the facts of the case and the tariffs. The court then made “a finding of fact” that the most plaintiff could recover from defendant was the \$25,000 it paid to Thomas. Later, the court issued an order denying defendant’s motion and sua sponte granting plaintiff summary disposition under MCR 2.116(I)(2). The court also awarded plaintiff \$10,000 in “stipulated” damages. Defendant appeals the denial of its motion as well as the court’s grant of summary disposition to plaintiff.

## II. Standard of Review

We review the court’s grant or denial of summary disposition de novo. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). Although the trial court did not specify the grounds on which it denied defendant’s motion, because it looked beyond the pleadings to the evidence presented, its ruling was based on MCR 2.116(C)(10). *Steward v Panek*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (Docket No. 222847, decided 6/4/02), slip op at 5. A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the plaintiff’s claim. *Id.* at 5-6. The moving party has the initial burden of showing that no genuine issues of material fact exist. *Veenstra, supra* at 163. In order to avoid summary disposition, the opposing party must produce evidence demonstrating that factual issues remain. *Id.* “Evidence offered in support of or in opposition to the motion can be considered only to the extent that it is substantively admissible.” *Id.* The court must view all of the evidence in a light most favorable to the non-moving party. *Id.* at 164. Summary disposition is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Steward, supra* at 6.

## III. Analysis

Defendant first argues that the trial court erroneously found that tariffs between Ameritech and the MPSC apply to it. We agree, although not for reasons asserted on appeal by defendant.<sup>1</sup> In opposition to defendant’s motion for summary disposition, plaintiff attached four

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<sup>1</sup> See *People v Cain*, 238 Mich App 95, 127; 605 NW2d 28 (1999) (stating that this Court is empowered to go beyond the issues specifically raised on appeal to address any issue that, in the  
(continued...)

documents purporting to be tariffs applicable to this case. Three of the documents state, on the face of the document, that the tariff described therein was issued on October 12, 1995, two months after the accident resulting in the underlying action. Thus, these tariffs could not have been applicable to the instant action. The fourth document was issued March 5, 1993 and was effective March 22, 1993. On the bottom of the face of this document is the word CANCELLED. The document neither describes the significance of the word CANCELLED in relation to the substance of the document, nor when the cancellation is effective.

We conclude that the documentation submitted by plaintiff is insufficient to establish a genuine issue of material fact as to defendant's liability pursuant to a tariff authorized by the MPSC. The documentation is incomplete and not clearly applicable. It cannot be disputed that three of the tariffs relied upon by plaintiff were not even in existence at the time of the accident at issue. Furthermore, the fourth tariff relied on by plaintiff was arguably cancelled by the date of the accident. The attached documents simply fail to constitute specific evidentiary proofs that create a genuine issue of material fact for trial. MCR 2.116(G)(4). Accordingly, the trial court erred by denying defendant's motion for summary disposition.<sup>2</sup>

Likewise, the trial court erred by granting summary disposition for plaintiff under MCR 2.116(I)(2). Not only was the documentary evidence produced by plaintiff insufficient to create a genuine issue of material fact precluding summary disposition in favor of defendant, it was also insufficient to establish plaintiff's entitlement to judgment as a matter of law.

Reversed.

/s/ Donald E. Holbrook, Jr.  
/s/ Kathleen Jansen  
/s/ Kurtis T. Wilder

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(...continued)

Court's opinion, justice requires be considered and resolved).

<sup>2</sup> While defendant did not present this argument on appeal, it did raise this claim in its motion for summary disposition filed with the trial court.